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Socially responsible intellectual property: a solution?

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Abstract

This article reviews the extent to which the present global IP system contains an inherent imbalance between the rights of IP owning corporations and IP users, and the public benefit. It also studies the potential relevance of human rights in redressing any imbalance within existing institutional and legal fora. The article focuses on the relevance of corporate social responsibility ("CSR") related concepts, particularly in conjunction with legal human rights based arguments, to redress any imbalance by tempering the global conduct of IP owning corporations; how this new approach could be enforced, if at all, and the resulting lessons for IP and its future.

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1. Introduction

As scientific and technological advances have continued, with potential to dominate lives, the intellectual property system (“IP”) has conferred private rights over elements of those advances. As a result, the owners of important IP acquire power to themselves dominate lives. By refusing to share their IP, and raising court actions to prevent others using it, such corporations can, for example, determine who may receive patented medicines; work with groundbreaking technology such as that relating to the human genome; access technology necessary to compete in a standardised market; or download online material, on what terms and for what purposes.

Further, given the present structure of IP laws, the rights are generally in the hands of corporations, rather than individual inventors or creators;¹ and with the growth and amalgamation of corporations in, for example, the pharmaceutical and entertainment sector, there is potential for rights of global significance to be held by a small number of corporations based in the developed world.² In the context of debate over power shifts from states to corporations,³ or at least acquisition by corporations of parallel power, this is creating a new world where uses and the future of key technologies and materials are controlled outwith conventional and established means of accountability.⁴

Against this backdrop, this article will conduct a preliminary review of the extent to which the present global IP system contains an inherent imbalance between the rights of IP owning corporations and IP users, and the public benefit; and a review of the potential relevance of human rights in redressing any imbalance within existing institutional and legal fora. The article will then focus on the relevance of corporate social responsibility (“CSR”) related concepts, particularly in conjunction with legal human rights based arguments, to redress any imbalance by tempering the global conduct of IP owning corporations; how this new approach could be enforced, if at all, and the resulting lessons for IP and its future.⁵

¹ Eg in the UK, see section 11(2) Copyright Designs and Patents Act 1988, section 7(2) and 39 Patents Act 1977

² See eg F. Macmillan “Copyright’s Commodification and Creativity” Oxford Intellectual Property Research Centre Working Paper Series No 2 January 2003 <<http://www.oiprc.ox.ac.uk/EJWP0203.html>> (last accessed 9 November 2005) (“MacMillan”), 7-9; and “Grass Roots Action in Food and Farming” report at <<http://www.gaff.org.uk/index.php?a=60>> (last accessed 9 November 2005).

³ See eg D. Kinley & J. Tadaki “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law” 44 Va. J. Int’l. L. 932 2003-4, (“Kinley”) 933

⁴ See eg A.R. Chapman “Approaching intellectual property as a human right: obligations related to Article 15(1)(c)” Copyright Bulletin, vol XXXV No. 3, July-September 2001 UNESCO Publishing, 23 (“Chapman”)

⁵ This article develops ideas explored by the author in “Power Responsibility and Norms. Could and Should Human Rights be used as a Curb on Intellectual Property Rights” at <http://www.law.ed.ac.uk/ahrb/publications/online/ipandhumanrights.doc> (last accessed 11 May 2005) (“Brown”)

The article concludes that there is a valuable role to be played by human rights in guiding the future of IP and more equitable sharing in technological progress, in established fora; a practical role for a philanthropic approach to IP based on CSR principles; and also a role for a combination of the human rights and CSR fields, with human rights providing a possible legal platform for a more creative, less property based approach to IP, in appropriate circumstances. This would be based on a balance of the rights and obligations encompassed by IP and human rights, and for enlightened self interest and benevolence to encourage corporations to choose to adopt of this approach. However, although mechanisms for prescribing and clarifying the conduct advocated are considered, there are inherent limitations in a suggested solution which is outside the court process, and is therefore ultimately dependent on the support of the IP owners.

2. The evolution of corporate power over IP

2.1 Development of IP

The present IP system, found in national and regional laws but underpinned and constrained by international treaties such as the WTO TRIPS agreement, the WIPO Copyright Treaty and the Berne Convention can be traced from medieval Venice and the UK Statute of Anne.⁶ Since then, IP has evolved to deal with scientific and technological developments, from the double tape deck recorder, radio and the cinema, to computer software, internet downloading, and genetically modified organisms. Throughout such development, however, the dominant driving force has been the interest of IP owning corporations, largely based in the EU and the US. The most significant instance of this was their influencing, it has been said coercing, of the evolution and negotiation by states of TRIPS. TRIPS imposed mandatory minimum standards of IP protection on all members of the WTO in circumstances when some members had no IP system, and some excluded, for example, pharmaceutical patents from protection – an issue of key concern for US and EU pharmaceutical corporations.⁷

As a result of this corporate influence, the focus in IP treaties remained on the creation and expansion of rights, rather than on preservation or creation of freedoms for third parties. That said, momentum was from time to time gained by those supporting other interests, evidenced by the existence and development of exceptions and defences, the revisiting of international treaties and the introduction of tools such

⁶ See eg Chapman, 7.

⁷ Agreement on Trade Related Aspects of Intellectual Property Law (“TRIPS”) 1994, Annex IC to WTO Marakesh Agreement. The most notable commentator in this field is Peter Drahos, particularly in respect of the impact of coercion, rather than negotiation, in the development of TRIPS, and the direct role of corporations. See eg P. Drahos “Negotiating Intellectual Property Rights: Between Coercion and Dialogue” 161-8 (“Drahos”) in P.Drahos and R.Mayne (eds) (2002) *“Global Intellectual Property Rights. Knowledge, Access and Development”* Palgrave MacMillan, Basingstoke and New York (“Drahos/Mayne”); P. Drahos “The Regulation of Public Goods” JIEL 7(2) June 2004, 321, 336-8 and fuller analysis in P.Drahos with J. Braithwaite (2002) *“Information Feudalism. Who owns the Information Economy”* Earthscan Publications Ltd, London (“Drahos 1). More generally regarding the impact of corporate power on IP see MacMillan, 1-2; C. Waelde “Copyright, Corporate Power and Human Rights” (publication forthcoming in F.Macmillan (ed) (2005) *“New Directions in Copyright Law: Volume 2”* Edward Elgar Publishing, London) (“Waelde”), 2

as exhaustion of rights, and systems such as moral rights.⁸ This has purported to create and reflect a balance of differing private and public interests. However, these provisions and systems remain exceptions, variations or complements to IP rights. Further, several bilateral and regional trade agreements, largely between on the one hand countries from the developed world (which tend to develop and export IP), and on the other from the developing world or smaller developed countries (which tend to import IP), require the exclusion of possible exceptions, permitted by TRIPS, from national IP laws. Significant commentary in this field suggests that a key motivation behind such aspects of these agreements has again been the interests of IP owning corporations.⁹

Thus, the baseline remains an IP system driven primarily by the economic interests of producers, publishers and employers – with no actual rights for the individual employee author or inventor, or the public.¹⁰ The merits of such an economic, incentive based approach to IP is outside the scope of this article, although it is noted that such arguments exist.¹¹ The initial question here is whether the evolving IP regime, even accepting its foundations in the corporate private sphere, fails to provide adequate and appropriate fetters on the exercise of corporate power over IP rights.

2.2 IP's internal limitations

Firstly, it is undeniable, and has been the subject of detailed commentary, that limits do exist on IP rights themselves. The main IP treaties, and national and regional legislation arising from them, limit the scope and duration of rights, and the circumstances in which they will subsist. Further, as considered above, they include and permit exceptions to IP rights such as compulsory licensing; parallel importing; and fair use, fair dealing and research (these subject to the general tests of being limited exceptions which do not conflict with the normal exploitation of the IP right, and not giving rise to unreasonable prejudice to the legitimate interests of the owner). There are also residual provisions seeking to protect conduct in the public interest, and to protect public health, benefit and morality.¹²

⁸ For overview see W.R. Cornish and D. Llewellyn (2004) (5th Ed) *Intellectual Property: Patents, Copyright, Trade Mark and Allied Rights*, Sweet & Maxwell. London, UK ("Cornish"), 19-20, 26-33, 42 (and references), 244-7, 288-94, 440-6 and 452-467

⁹ For details of agreements and overview of this field see UK Commission on Intellectual Property Rights, "Integrating Intellectual Property Rights and Development Policy" September 2002 ("CIPR") 163, (see <http://www.iprcommission.org/> (last accessed 9 November 2005)); overview provided in Oxfam Briefing Note "Free Trade Agreement Between the USA and Thailand Threatens Access to HIV/AIDS Treatment" July 2004 <http://www.oxfam.org.uk/what_we_do/issues/health/bn_fta_hiv_aids.htm> (last accessed 9 November 2005); Drahos in Drahos/Mayne 172-4; and Brown, 23 (and references).

¹⁰ See above regarding ownership and eg MacMillan, 3-4, 7, 12-4

¹¹ See eg Sherwood, R.M. (1990) *Intellectual Property and Economic Development* Westview Special Studies in Science, Technology, and Public Policy, Westview Press Inc, Colorado, USA and Oxford, UK; cf CIPR; and generally see Cornish, 35-41

¹² See eg TRIPS articles 6,7, 8(1), 27(2); 30, 31, 40; Berne Convention article 9(2); also eg in the UK Sections 27, 29, 30, 171 (3), 293-4 Copyright Designs and Patents Act 1988 and Sections 1(3), 46, 48, 55, 59, 60(5) Patents Act 1977. For analysis, see Cornish, 440-6, T. F. Cotter (1999) "Intellectual Property and the Essential Facilities Doctrine" *Antitrust Bulletin*, XLIV (1) Spring, 211-50, in R. Towse and Holzhammer, (eds) (2002) *The Economics of Intellectual Property vol IV Competition and*

There are uncertainties and inconsistencies, however, as to the scope of these provisions, at both national and international level. These uncertainties often have significant practical impact in respect of the power conferred by the IP right – for example, is commercial testing to develop a new drug exempt from infringement? To what extent is parallel importing, to obtain cheaper drugs and materials, permitted? When and how will compulsory licensing of data, processes and rights to equipment and software be required and administered? What is actually covered by “fair use” and “the public interest?”¹³

Further clarification of these exceptions, by courts, legislators or WTO bodies is therefore required. However, even if this were to be done, the fact remains that the IP right is, as considered, frequently owned by a well resourced corporation. If the IP owner does not take kindly to what it sees as unwarranted or undesirable interference with its IP right (even if the conduct may be legally justifiable), it may take steps to prevent it: letters of complaint, commercial pressure, even initial proceedings. The possibility of unjustified threats¹⁴ or defamation actions, and the professional restrictions on advisors in respect of pursuing worthless claims (rare in themselves, given the many opportunities for creative argument within IP legislation), will not always prevent some steps being taken.

As a result those considering using, in the broadest sense, the IP of an aggressively minded corporation, or those who may inadvertently do so, could be faced with costly and time consuming litigation – rarely an attractive concept. This fact of life confers yet further power on the incumbent IP owning corporation. Can external doctrines be prayed in aid by those seeking to limit corporate power over IP?

3. The potential relevance of human rights

3.1 Human rights and IP – an introduction

One external doctrine, human rights, is increasingly being considered together with IP by commentators and activists. Examples of this are the raising of human rights such as life, health, food, expression, information and education as potential practical and theoretical counters to IP rights - patents, plant variety rights, copyright and trade marks - with a view to facilitating access to food, medical treatment, data and materials, and transmission of information and opinion.¹⁵

This dialogue has also been reflected at international institutional level, with the World Summit on Information Society and the World Health Organization

International Trade” The International Library of Critical Writing in Economics 145, Edward Elgar Publishing Ltd, Cheltenham, UK (at 177-216), 185-90; Waelde, 2-3; and Brown, 14-7

¹³ See Brown, 18-22 for primary and secondary references and further analysis

¹⁴ Eg in the UK, section 70 Patents Act 1977 and section 21 Trade Marks Act 1994

¹⁵ See eg L. R. Helfer “Human Rights and Intellectual Property: Conflict or Coexistence” 5 MINN. INTELL. PROP. REV 47 (2003), 47-52 at <http://mipr.umn.edu/archive/v5n1/Helfer.pdf> (last accessed 9 November 2005) (“Helfer”); Brown, 3-5 for references and further analysis; and also consideration and references by the author in “Guarding the guards: the practical impact of human rights on protection of innovation and creativity”, <<http://www.bileta.ac.uk/pages/Conference%20Papers.aspx>> (last accessed 9 November 2005), (“Brown1”) 2.

considering both human rights and IP in their work in respect of contemporary challenges in communications, information accessibility and health.¹⁶ Examples include the reference to IP in the WSIS Geneva Declaration of Principles and Plan of Action, in the context of encouraging innovation and creativity and access to knowledge and innovation - although note that the draft documents from the Tunis phase and the draft conference report do not, at present, refer to IP.

More intricate questions of the relationship arise in the debate as to whether IP can, to any extent, itself be considered a human right. This argument finds some support in human rights theory, both on the natural rights basis that IP is a reward for activity, to which the creator should be entitled,¹⁷ and in utilitarianism, as (possibly) the most effective means of encouragement innovation and creativity, which ultimately benefits all.¹⁸

Further, however, international human rights instruments, article 27(2) Universal Declaration on Human rights 1948 (“UDHR”) and article 15(1)(c) International Covenant on Economic Social and Cultural Rights 1966 (“ICESCR”), recognise the right of “everyone” to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.¹⁹ While this could cover the rights of innovators and creators covered by patent and copyright, it should also be noted that the same articles of the instruments (article 27(1) and article 15(1)(a) and (b) respectively) recognise the right to, essentially, take part in cultural life and enjoy the benefits of scientific progress and its application. As a result, commentators working in this field have used these articles as a basis to increase pressure on states and the international community to foster a less property based approach to IP, one with more of a balance of private and public interests.²⁰ Notable commentary has further argued that the human rights arising on this basis in respect of IP should in any event be limited to actual authors rather than corporations, focussing on an individualist approach to authorship.²¹

¹⁶ See re WSIS <<http://www.itu.int/wsish/>> (last accessed 9 November 2005) and Declaration of Principles <<http://www.itu.int/wsish/docs/geneva/official/dop.html>> (last accessed 9 November 2005). Regarding the WHO Commission on Intellectual Property Rights, Innovation and Public Health <<http://www.who.int/intellectualproperty/en/>> (last accessed 9 November 2005), particularly the recent submissions section.

¹⁷ See J. Locke (1994 edn) “*Two Treatises of Government*” The Legal Classics Library, New York (“Locke”) at 169, 185-8 (right to fruits of labour) – although note significant challenge to this approach, for example M.Khor “Rethinking Intellectual Property Rights and TRIPS” 201, 203 in Drahos/Mayne – IP is a privilege, not a right.

¹⁸ Regarding utilitarianism, see J. Shestack, “The Philosophical Foundations of Human Rights” (“Shestack”) in J. Symonides, (ed) (2002) “*Human Rights: Concepts and Standards*” Dartmouth Publishing Co Ltd, Aldershot, England and Ashgrove Publishing Co, Vermont, USA and UNESCO, Paris (“Symonides”) 45-6, and J.S. Mill (1910) “*Utilitarianism, Liberty and Representative Government*” Everyman’s Library, J.M. Dent & Sons Ltd, London

¹⁹ See also article 17(2) EU Charter which specifically refers (albeit in the context of protection of property) that IP should be protected.

²⁰ See detailed analysis in Chapman, 10-14; E. Nwauche “Human Rights: Relevant considerations in respect of IP and Competition Law” (publication forthcoming in SCRIPT-ed December 2005) (“Nwauche”); and Ricketson

²¹ See Ricketson, 192 building on reference to “author” in instruments.

United Nations Commission for Human Rights bodies have also addressed the question of the relationship, the extent to which IP is a human right, and the implications of this. Perhaps surprisingly, some significant developments have focussed only on authors' rights, rather than those of the wider public. In a 2000 resolution,²² the Sub-Commission for Promotion and Protection of Human Rights, referring only to articles 27(2) and 15(1)(c), noted the apparent conflict in implementation between TRIPS and obligations under international human rights instruments; that primacy should be accorded to human rights; and that states should observe the social function of IP, in accordance with human rights principles. From the practical perspective, the resolution called for a report on human rights and IP from the High Commissioner, and for a General Comment.

Reports indeed followed, from the Secretary General and the High Commissioner. These provide analysis and overview, particularly from the perspective of patents and health, of the tense, but not necessarily uncomplementary relationship and balance between IP and human rights. They express concern, however, at the greater focus in TRIPS on commercial, property interests rather than on the more public and human rights interests. This is noted to be reflected in TRIPS' minimum mandatory standards of protection of IP, as opposed to comparatively vague, and optional, exceptions.²³ The reports were followed by a further resolution, in August 2001, (again focussing on articles 27(2) and 15(1)(c)) calling for an expert seminar to be held on the relationship between IP and human rights; investigation of the extent to which patents are compatible per se with the promotion and protection of human rights; again called on states to observe the social function of IP, in accordance with human rights principles; and called on states to respect their human rights obligations when reviewing and implementing TRIPS.²⁴

The Committee on Economic Social and Cultural Rights issued a statement on intellectual property and human rights in December 2001, as its "preliminary contribution to the rapidly evolving debate on intellectual property", notwithstanding

²² UN SubCommission for Promotion and Protection of Human Rights Resolutions 2000/7 <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> (last accessed 20 November 2005)

²³ Commission on Human Rights Sub-Commission for the Promotion and Protection of Human Rights Economic, Social and Cultural Rights. Intellectual Property and human rights. Report of the Secretary General ("Report of Secretary General") <http://www.hri.ca/fortherecord2001/documentation/commission/e-cn4-sub2-2001-12.htm> June 2001 (last accessed 20 November 2005). See paras 1,B,3(b)(f); I,B,24(b) and I,B,4(d). Commission on Human Rights Sub-Commission for the Promotion and Protection of Human Rights. Report of the High Commissioner. The Impact of the Agreement on Trade-Related Aspect of Intellectual Property Rights on human rights ("Report of High Commissioner") [http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/590516104e92e87bc1256aa8004a8191/\\$FILE/G0114345.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/590516104e92e87bc1256aa8004a8191/$FILE/G0114345.doc) June 2001 (last accessed 20 November 2005): see paras 10, 11, 14, 16, 17, 20, 21, 23, 28, 30, 61/2

²⁴ Resolution 2001/21 [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.2001.21.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2001.21.En?Opendocument) (last accessed 9 November 2005), continuing the consideration started in November 2004 – see minutes <http://www.ohchr.org/english/bodies/cescr/docs/note33-rev8Dec.doc> (last accessed 20 November 2005).

its resolution that a general comment should be adopted as soon as possible.²⁵ The statement concludes that:

The Committee considers of fundamental importance the integration of international human rights norms into the enactment and interpretation of intellectual property law. Consequently, States parties should guarantee the social dimensions of intellectual property, in accordance with international human rights obligations to which they have committed themselves. An explicit commitment to do so and the establishment of a mechanism for a human rights review of intellectual property systems are important steps towards that goal.

Since 2001 a Special Rapporteur has been appointed, and a draft general comment prepared. However, the fate of this draft to date is indicative of the difficulties accompanying the relationship between IP and human rights, and the proper place of IP within the human rights matrix. There is also concern that the draft focussed narrowly on the rights of authors/inventors, (focussing as it does on article 15(1)(c)) rather than the broader questions raised by innovation and creativity and the public interest.²⁶ The Committee on Economic Social and Cultural Rights considers the draft again on 21 November 2005.²⁷

These developments at practical and institutional level, mean that it can legitimately be argued that human rights and IP should properly form part of the same debate – most particularly, that the former should inform, guide and direct the latter.²⁸ This embracing of human rights²⁹ has to some extent obscured, however, real challenges involved in using human rights to control the use of IP through the judicial system as well as seeking to influence it in the political context. The existence of challengers to the place and nature of human rights discourse in IP (and vice versa), together with the fundamental concern of this paper as to the power of corporations, and the need for direct control over them, mean that this cannot be lightly dismissed. Problems in the judicial context include identifying what are relevant human rights; their content and scope; and how IP owning corporations could in fact act, or be compelled to act, in a manner which produces outcomes consistent with the rights of potential infringers, third parties and IP owners themselves.

²⁵ <http://www1.umn.edu/humanrts/esc/escstatements2001.html> (last accessed 9 November 2005)

²⁶ For comment see IP Watch <http://www.ip-watch.org/weblog/index.php?p=12&res=1024&print=0> (last accessed 9 November 2005)

²⁷

[http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/CC358ED39E2B93BCC12570AE0037EB91?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/CC358ED39E2B93BCC12570AE0037EB91?OpenDocument) (last accessed 20 November 2005)

²⁸ For fuller consideration of UN activities in this field see Helfer, 48, 56; Chapman, 6-7; and Brown, 28-9

²⁹ See also Professor C.A. Gearty “The Holism of Human Rights: Linking Religion, Ethics and Public Life” [2004] E.H.R.L.R. Issue 6, 605, re: role of human rights as a “counter point” to globalisation (605), a “rallying-point” for NGOs (606), and “an indispensable tool in supplying an ethic for selfless action in our post-modern age ” (609); and R. Wai “Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime” EJIL (2003), Vol. 14 No. 1, 35-84 (“Wai”), 77

3.2 Human rights in court

3.2.1 Basics

To further explore the relevance of human rights to IP, the first challenge must be addressed: what human rights exist to be used? Both human rights instruments and theories are relevant here.

There is a wide range of instruments at regional and international level. Fortunately, however, there are significant consistencies and synergies between these: consider for example, the nonbinding but inspirational and aspirational UDHR, the International Covenant on Civil and Political Rights 1966 (“ICCPR”) and ICESCR, the European Convention on Human Rights 1950 (“ECHR”) and the African Charter of Human and People’s Rights 1981. If the two 1966 instruments are taken together for these purposes,³⁰ analysis of all these instruments suggests that when there has been consideration of rights to be enshrined in international instrument, the existence has been accepted of the universal and inalienable rights to life, health, freedom of expression and information/education³¹ – albeit subject to differing limitations.³²

From the theoretical perspective, theories of rights, natural rights and justice are also relevant. Natural rights theory considered above proposes rights to life and property;³³ and Dworkin’s rights theory³⁴ and Rawls’ theory of justice,³⁵ both of which teach in

³⁰ See M. Nowak “Civil and Political Rights” 69-107 at 70-1 and A. Eide “Economic, Social and Cultural Rights” 109-173 at 111-2, both in Symonides regarding the history of the two 1966 instruments

³¹ See Shestack in Symonides 43-4 re the extent of international agreement on existence of rights.

³² See Brown, 10-1 for detailed references and consideration of the nature of the limitations – such as the public interest, rule of law in a democratic society, or peaceful enjoyment of property. This issue is also explored in more detail in a paper prepared by the author for the “IP Charter” project of the Royal Society of Arts 2005 – launched as to Adelphi Charter on creativity, innovation and intellectual property on 13 October 2005 – <<http://www.adelphicharter.org/>> (last accessed 9 November 2005). Note also, in terms of the weight of limitations, the Vienna Declaration and Programme of Action 1993 <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)> (last accessed 24 May 2005) asserts (article 5) the indivisibility, interdependence and universality of all human rights; and provides no guidance on how conflicts between human rights, such a fundamental question in the IP context, are to be resolved. All rights are to be treated “on the same footing, and with the same emphasis”.

³³ See Locke, considered above, consistent with the Enlightenment approach, Locke considered that these fundamental rights arise from nature on the basis of reason

³⁴ R. Dworkin (1977) “*Taking Rights Seriously*” Duckworth, UK (“Dworkin”). Individual rights exist and are distinct from law. There is a right to liberty and equality and specific rights (eg free speech, free use of property) must be separately assessed. The relevant approach is whether a right is necessary to protect against otherwise inevitable encroaching on the individual by utilitarianism considered above (which, to operate practically, must take into account the external, non personal, wishes of the majority, its focus being to delivery the greatest good, or felicity, to the greatest number). See Dworkin at 184-5, 191-2, 197-9, 269, 270, 273, 274, 275, 277.

³⁵ J. Rawls (1972) “*A Theory of Justice*” Clarendon Press, Oxford, UK (“Rawls”) – persons should choose, through a veil of ignorance, the fundamental terms on which they would associate; they would choose in the interests of the wider benefit, with rights and duties equally assigned, rather than through a self interested or utilitarian focus on the good of the majority at the expense of the minority (Rawls at 11-2, 14). Each person should have equal rights to liberty compatible with similar liberty for others (see also Rawls at 61, 302). Inequalities would only be justified if they nonetheless resulted in compensatory benefit for all, particularly the least advantaged (Rawls at 14-5). The validities of

the first instance the general principles of liberty and equality, include rights of free expression,³⁶ and also provide some limited theoretical guidance as to how rights can interrelate.³⁷

3.2.2 *National and regional disputes*

As stated above, however, some global and theoretical consensus as to existence of relevant human rights and their interrelationship is only the first step from the perspective of courts. Despite the global importance of IP and its possible negative implications, IP rights exist, in law and in practice, as individual national or regional rights. Their owners can only be compelled to act by orders of national and regional courts or tribunals. For human rights to have an impact in this context, the courts and tribunals must be entitled to take a human right into account (for example, to refer to the ECHR or to consider legal theory); and also be able to do so in a relevant way, for example to prevent the conduct being infringement, or to compel sharing of the IP.

Even in such a situation, however, the human right will be considered at the same time as a legally granted right which, as mentioned above, at least arguably brings some benefits in terms of incentive to innovation, creativity and investment; and which already, as again considered above, contains its own restrictions reflecting an attempted balance of interests. Previous analysis of cases from several jurisdictions considering the main IP rights and a range of human rights has revealed that only in exceptional factual circumstances will courts actually consider it necessary for the argued human right, and its limitations, to prevail over the IP right, and its limitations. Examples have been when the nature of a publication required that the precise text of another work be reproduced, as in *Ashdown v Telegraph Group Ltd*,³⁸ or where the constitutional right to free speech prevailed over a trade mark in the absence of the likelihood of substantial economic harm, as in *Laugh it Off Promotions v South Africa Breweries*.³⁹ More commonly, courts have found that the balance of interests inherent in IP is satisfactory.⁴⁰

Outside the decided cases, where could one find such exceptional circumstances? Probably in a clash between patents and life in accessing medicines: but the complexity of that debate – for example, as considered above, the argued need for patents to stimulate investment in research and development,⁴¹ and the fact that delivery of medicine to an area by no means equates to its proper delivery to those in need⁴² – suggests that victory for the human rights argument could not be assured.⁴³

assumptions and choices could then be tested until a reflective equilibrium was reached (Rawls at 48-50)

³⁶ Dworkin at 197; and Rawls at 61, 225.

³⁷ Rawls at 41-5, 243 et seq, 302, 543; and Dworkin at 194, 199, 203-4

³⁸ [2002] R.P.C. 5 – decision of English Court of Appeal

³⁹ Case CCT 42/04 decision of Constitutional Court of South Africa, available at <http://www.constitutionalcourt.org.za/site/laughitoff.html> (last accessed 27 October 2005)

⁴⁰ See references and analysis of cases from England, Scotland, France, the Netherlands, South Africa, the United States, WIPO domain name panels and the European Court of Justice in Brown1, 2-11.

⁴¹ but see CIPR 32-3 re role of IP in research of interest to developing countries

⁴² See overview CIPR, 38-9

⁴³ See also Brown, 17-8

In the light of this, more prosaic cases, such as those concerning attempted prevention of downloading, or refusal of access to technology to enable market activity, are perhaps unlikely to succeed on the basis of a human rights argument.

3.2.3 *The international stage*

If national and regional courts may not be of assistance, could recourse be had to international opportunities? If so, what could be achieved?

The relevant forum, from the IP perspective, would be the WTO dispute settlement system, comprising panels and the Appellate Body.⁴⁴ As stated above, minimum standards of IP protection are set out in TRIPS, part of the WTO agreement. TRIPS imposes obligations on states, and compliance can be challenged - by states, against other states - in the WTO dispute settlement system.⁴⁵ Interestingly in the present context, there is notable ongoing debate amongst commentators (full exploration of which is outside the scope of this paper), including on the basis of recent WTO panel and Appellate Body decisions, as to the extent to which human rights can or should be part of the WTO,⁴⁶ and relevant to the interpretation of WTO obligations, including those under TRIPS. The intensity of debate suggests that a consensus is not imminent, however arguments include the place of human rights as part of *ius cogens*; the relationship between the WTO and other forms of international law; the relevance, if any, of whether the parties to any dispute are also party to a relevant human rights treaty; and the need for the state's measures under challenge to protect public morals and human life or health.⁴⁷

⁴⁴ See TRIPS article 64 and Dispute Settlement Understanding ("DSU"), Annex 2 of WTO Agreement. Appendix 1 of the DSU states that it applies to TRIPS.

⁴⁵ Recital (d) to TRIPS refers to providing a means of settlement of disputes between governments; article 64 refers, *inter alia*, to the DSU. Article 1 DSU states that it applies to disputes between members.

⁴⁶ Wai, 37-9,41, 45, 48-50, 52, 57-9, 61, 81-2 (and 42, 64, 66 regarding consideration by WTO dispute settlement of the proper implementation and interpretation of TRIPS). Regarding the link between human rights, market economics and world trade, see E-U Petersmann, 'Time for Integrating Human Rights into the Law of Worldwide Organizations', *Jean Monnet Working Paper 7/2001*, Harvard Law School. <<http://www.jeanmonnetprogram.org/papers/01/012301.html>> (last accessed 7 May 2005), "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston" <<http://www.ejil.org/journal/Vol13/No4/art3-01.html>> (last accessed 9 November 2005), and "Theories of Justice, Human Rights, and the Constitution of International Markets" Fall 2003 37 Loy. L. A. Rev. 407. More from the international trade perspective, see articles XX(a) and (b) GATT 1974 – considered in R. Howse and M. Mutua "Protecting Human Rights in a Global Economy. Challenge for the World Trade Organisation" 2000 Rights & Democracy <<http://www.ichrdd.ca/english/commndoc/publications/globalization/wtoRightsGlob.html>> (last accessed 9 November 2005) 2, 3, 8, 9, 17. The move towards human rights is challenged, however, particularly in P. Alston "Resisting the Merger and Acquisition of Human Rights by World Trade Law: A Reply to Petersmann" <<http://www.ejil.org/journal/Vol13/No4/art2.pdf>> (last accessed 7 May 2005). See overview in Kinley, 1005-1014; and also D. Shelton, "Globalization and the Erosion of Sovereignty In Honor of Professor Lichenstein: Protecting Human Rights in a Globalized World" 25 B. C. Int'l & Comp. L. Rev. 273 ("Shelton"), 280-90.

⁴⁷ Primary materials include articles 31, 32 and 53 Vienna Convention on the Law of Treaties 1951; GATT 1947, article XX(a) and (b) cf articles 7, 8, 30 and 27 TRIPS; decisions of the Appellate Body in Shrimp/Turtle WT/DS58/AB/R (1998) and Shrimp/Turtle 21.5 WT/DS58/AB/RW (2001) available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm> (last accessed 1 November 2005); Canada/Patent WT/DS114/R (2000) available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm> (last accessed 1 November 2005).

In any event, however, IP owning corporations are not parties to TRIPS. Thus, if states choose not to require more compulsory licensing of patented medicines, or provision of access to online information and material (which they may, but are not obliged to, do under TRIPS)⁴⁸ there is no obligation for relevant IP owning corporations to provide access or to license. Their lack of action cannot be challenged in the WTO dispute settlement system. This is so notwithstanding that the state may have an emerging economy and that the IP owning corporation may be part of a large multinational, better able to address the problems in issue. This effective immunity is to the benefit of corporations, given that research suggests a complex interrelationship between states, corporations and officials, at least in the EU and the US, in influencing the making and conduct of complaints to the dispute settlement system⁴⁹ - indeed, it has been said that the system is “converting private interests into public claims”.⁵⁰

There are discussions and initiatives in respect of opening, to some extent, the WTO dispute settlement system to those other than states. Notwithstanding some significant criticism, however, this is mainly in the context of enabling views other than those of states (such as NGOs – and, inevitably, corporations themselves) to be put forward by way of amicus briefs, rather than enabling those other than states to make their own complaints, or be directly the subject of complaint.⁵¹

Interesting commentary includes: J. Pauwelyn (2003) “*Conflict of Norms in Public International Law*” Cambridge University Press, Cambridge, UK (“Pauwelyn”); S. Cho “Linkage of Free Trade and Social Regulation: Moving beyond the Entropic Dilemma” 5 Chi. J. Int’l L. 625 Winter, 2005; C.M. Correa “TRIPS Disputes: Implications for the Pharmaceutical Sector” Occasional Paper 5 Friends World Committee for Consultation, Quaker United Nations Office – Geneva, available at http://www.geneva.quno.info/main/search_publication.php?loop=0# (last accessed 1 November 2005); R. Howse “The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate”, available at <<http://www.worldtradelaw.net/articles/howseshrimp.pdf>> (last accessed 1 November 2005) published at 2002 27 Colum. J. Envtl. L. 491; G.M. Zagel “WTO & Human Rights: Examining Linkages and Suggesting Convergence” IDLO Voices of Development Jurists Paper Series Vol 2. No. , 2005, available at http://www.idli.org/DLRC/vdj/vdj2_2005.htm (last accessed 1 November 2005); G. Marceau “WTO dispute settlement and human rights” EJIL 2002 13(4) 753-814; J.Kiehl “TRIPS Article 31(B) and the HIV/AIDS Epidemic” 10 J. Intell. Prop. L. 143 Fall, 2002; F.M. Abbott “The TRIPS Agreement, Access to Medicines and the WTO Doha Ministerial Conference” 2001 Occasional Paper 7 Friends World Committee for Consultation, Quaker United Nations Office – Geneva, available at <http://www.quno.org/economicissues/intellectual-property/intellectualLinks.htm#QUNOPUB> (last accessed 1 November 2005)

⁴⁸ On the basis of articles 7, 8, 31

⁴⁹ See Drahos in Drahos/Mayne, 169-171

⁵⁰ S. Picciotto “Defending the Public Interest in TRIPS and the WTO” 224 at 231 in Drahos/Mayne. See also more generally in this regard 229-230. Detailed analysis of the impact of private corporations in on WTO litigation is found in G.C. Shaffer (2003) “*Defending Interests. Public-Private Partnerships in WTO Litigation*” Brookings Institution Press, Washington DC.

⁵¹ See Pauwelyn 68, 74, 199; S Charnovitz “The WTO and the Rights of the Individual” available at <<http://www.worldtradelaw.net/articles/charnovitzindividual.pdf>> (last accessed 1 November 2005) (published in 36 Intereconomics 98 (2001); F.M. Abbott “Trade Diplomacy, the Rule of Law and the Problem of Asymmetric Risks in TRIPS” (2003) Quaker United Nations Office Occasional Paper 13 available at <<http://www.quno.org/economicissues/intellectual-property/intellectualLinks.htm#QUNOPUB>> (last accessed 1 November 2005); B Stern “The Emergence of Non-State Actors in International Commercial Disputes Through WTO Appellate Cody Case-Law” Paper presented at “The WTO at 10: The Role of the Dispute Settlement System. An International Conference Stresa, Italy – 11-13 March 2005” - on file with the author.

In summary, therefore, the relevant international dispute settlement systems in respect of IP are highly unlikely to be of any direct impact in attempts to influence and control global corporations from the human rights perspective.

3.3 Pandora's Box

Finally, not only do human rights not in fact seem to be a universal panacea, they could, like widening access to the WTO dispute settlement system, be more of a Pandora's Box. When considering human rights, regard must also be had to the fact that under human rights instruments, IP owning corporations have a right to enjoy their property.⁵² Further, the theories of Rawls and Locke considered above, although not of Dworkin, support some form of right to property.⁵³

Any such right of corporations would cover the right to enjoy their IP (at least until such time as the right may be declared invalid or revoked) without sharing it with others, and to raise court actions to prevent others using it without their consent. However, even if a forum is able to consider all or some of these arguments, these rights do not, and should not, provide a complete counter and response to the human rights of others. Rather, they form part of the ongoing balancing of interests,⁵⁴ as is borne out by cases from the analysis referred to above, for example, again, *Ashdown v Telegraph Group Ltd* and *Laugh it Off Promotions v South Africa Breweries*, and also *Levi Strauss & Co v Tesco Stores Ltd*.⁵⁵ Arguments considered above that IP owners may have human rights in respect of their IP may also be relevant here, most particularly in the EU jurisdictions, given the express reference in the EU Charter to the protection of IP (although note the apparent limitations on the scope of the EU Charter).

Although again these arguments would seem unlikely to tip the balance of power further away from those challenging IP,⁵⁶ it is a final reminder that, however appealing human rights might seem as a theoretical counter to corporate exploitation

⁵² See Protocol 1 to ECHR, article 1 (and decision of European Court of Human Rights in *Anheuser-Busch Inc v Portugal* (App 73029/01) confirmed that a trade mark could attract the protection afforded by this provision to property see <http://www.echr.coe.int/Eng/Press/2005/Oct/ChamberJudgmentAnheuser-BuschIncPortugal111005.htm> (last accessed 8 November 2005) ; article 17 UDHR; article 14 African Charter; and article 17 Charter of Fundamental Rights of the European Union ("EU Charter") (for further details of this instrument and its status see N MacCormick (2005) "*Who's Afraid of a European Constitution*" Imprint Academic, Exeter, UK). For an analysis of the extent to which corporations should have human rights, see S. Bottomley "Corporations and Human Rights" 47-68 in S. Bottomley and D. Kinley (eds) (2002) "*Commercial Law and Human Rights*" Dartmouth Publishing Company, Ashgate Publishing, Hampshire, England and Virginia, USA ("Bottomley/Kinley")

⁵³ See Rawls at 61, Locke at 273-4; cf Dworkin, at 277-8 on the basis that restricting use of property would not be giving effect to external preferences, thus there is no need for the right to exist.

⁵⁴ See also S. Ricketson "Intellectual Property and Human Rights" 187-213 ("Ricketson") in Bottomley/Kinley – but which can in itself have negative practical implications – see J. MacMillan "Administrative Law, Commerce and Human Rights" 257-280 in Bottomley/Kinley (at 277) "These problems can be exacerbated if commercial entities have the scope to rely upon or, as probably, to co-opt the ideology of human rights to bolster the case being put or to fuel a litigation tactic to forestall an adverse decision".

⁵⁵ [2003] R.P.C. 18

⁵⁶ For consideration of the balancing of interests see Report of High Commissioner, articles 37-41

of IP, the path is, to say the least, not smooth.⁵⁷ Human rights law appears in reality to be of limited practical affect in fettering the corporate approach through the court process.

4. From rights to results – CSR: an alternative approach?

4.1 Introduction

If courts cannot be relied upon to produce an outcome attractive to human rights advocates or IP challengers, what could be achieved by a less direct approach? Could IP owning corporations be persuaded to engage in more palatable, less commercially focussed applications of their IP? This challenge may pose an opportunity for the seemingly ubiquitous CSR.⁵⁸

Like concern in respect of IP, CSR has grown with globalisation and the apparently unrestricted growth in power of corporations,⁵⁹ leading to the arguments that “global companies, as powerful economic, social and political actors, must increasingly be brought within the law’s domain”.⁶⁰ As will be considered, CSR is not, however, without its uncertainties and fundamental challengers,⁶¹ as “[t]he debate on CSR poses major conceptual questions about the status of corporations as moral actors and the nature of their ethical and legal obligations.”⁶²

At the practical level, CSR can be a tool bridging public concern and the corporate world, and providing a business and theory based legitimacy for corporations following treaties, standards or norms which may not be applicable or enforceable in respect of them. Examples can be seen in environmental and international labour relations, with changes in practice following storms of public protests relating to the decommissioning of the Brent Spar platform, and to working conditions in Nike factories.⁶³ In the context of IP, there is scope for a more altruistic approach to have real impact, by IP owning corporations taking steps which they are not required to

⁵⁷ See also Kinley, 967

⁵⁸ See, eg, “The Economist” January 22nd -28th 2005 A survey of corporate social responsibility. (“Economist”), 3-4

⁵⁹ See eg, Shelton, 27; N. Barry (1998) “*Business Ethics*”, MacMillan Business, Basingstoke and London, UK (“Barry”), 38; and Prof K.M. Leisinger “Towards Globalization with a Human Face: Implementation of the UN Global Compact Initiative at Novartis” (Published in Parallax, the Journal and Ethics and Globalization” January/February 2003)

⁶⁰ I.D. Bunn, “Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community” 2004 19 *Am. U. Int’l L. Rev.* 1265 (“Bunn”), 1306; and see also Kinley, 965-6

⁶¹ For overviews, see Barry, 68-90 cf United Nations Conference on Trade and Development (1999) “The Social Responsibility of Transnational Corporations” at <<http://www.unctad.org/en/docs/poiteiitm21.en.pdf>> (last accessed 9 November 2005) (“UNCTAD”). See also E. Joseph & J.Parkinson “Confronting the Critics” *New Academy Review* Vol. 1 Issue 1. Spring 2002, 48, 48, 51-61 (“Joseph”); M.Wolf “Response to Confronting the Critics” *New Academy Review* Vol. 1 Issue 1. Spring 2002, 62, 63-5; and W. Hutton “Response to Confronting the Critics” *New Academy Review* Vol. 1 Issue 1. Spring 2002, 66, 67

⁶² Bunn, 1301

⁶³ See, for example, D. Weissbrodt, and M. Kruger, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” October, 2003 97 *A.J.I.L.* 901 (“Weissbrodt”); (“UNCTAD”); and Kinley, 933-4

take, sharing IP, making new use of available tools, and not arguing for the boundaries of infringement to be further extended, or those of defences and exceptions limited.

For example, although precise circumstances would vary between national legal systems, corporations owning copyright and database rights in scientific databases could release data sets, enabling further research and treatment development by small university spinouts, notwithstanding that the proposed conduct may otherwise infringe IP rights; copyright owners could accept that reproduction of copies of a work for protest against child poverty was “fair”, and as such did not infringe; publishing corporations could remove anticircumvention devices and permit free online access to essential school materials; telecoms corporations could provide local telecoms companies with free patented equipment, and software subject to copyright, to enable them to further compete and provide better choice in smaller developing markets; and pharmaceutical patent owners could grant licences promptly to generic manufacturers to enable them to manufacture drugs to deal with emergencies for the local market and for export, responding further to long term activity by NGOs such as Oxfam⁶⁴ and Medecins Sans Frontieres.⁶⁵ Existing initiatives such as the Global Alliance for Vaccines and Immunization are examples of what can be achieved from cooperation of business, NGOs and international institutions.⁶⁶ More broadly, pharmaceutical companies could provide resources and infrastructure to train nurses to deliver the patented drugs, or, in a volte face, put pressure on governments to refrain from requiring additional levels of IP protection in bilateral and regional trade agreements, such as those considered above.⁶⁷

4.2 On closer analysis...

The breadth of examples begs the question, however, of precisely what is meant by CSR, why corporations may choose to some engage in it and how, if at all, engagement in it could be required and monitored.

A preliminary overview of the field merely confirms that a variety of approaches to CSR exist. Some commentators consider CSR to be no more than straightforward charity and generosity (ceasing if there is a conflict with profit),⁶⁸ or adherence to existing theories of business ethics.⁶⁹ A more balanced view sees CSR as advocating

⁶⁴ See Oxfam “Intellectual Property and the Knowledge Gap” December 2001 <http://www.oxfam.org.uk/what_we_do/issues/trade/trips_wsf2002.htm> (last accessed 9 November 2005)

⁶⁵ See most recently <http://www.msf.org/msfinternational/invoke.cfm?objectid=224B1730-E018-0C72-091E8829E29F80E6&component=toolkit.article&method=full_html> (last accessed 9 November 2005)

⁶⁶ See <http://www.vaccinealliance.org/index.php> (last accessed 21 November 2005).

⁶⁷ See also Report of High Commissioner, para 27

⁶⁸ See eg Barry, 76; Economist, 4, 8; Lord Browne “Governance and Responsibility: the relationship between Companies and NGOs” New Academy Review Vol. 1 Issue 1. Spring 2002, 12-14 (“Browne”)

⁶⁹ See Barry, 6,7,71; A. Smith (1978 ed)) “*Lectures on Jurisprudence*” (R.L.Meek, D.D. Raphael and P.D.Stein (eds) Clarendon Press, Oxford, UK (“Smith1”), 340-9; and A. Smith (1849) “*The Theory of Moral Sentiments*” John D. Lowe, Edinburgh, UK (“Smith2”), 119, 124-5, 229, 231, 233, 385. See also R.P.Malloy “The Modern Discourse of Law and Economics”, in R.P. Malloy and J. Evensky, (eds)

voluntary engagement in best global practices, for which there can also be tangible business benefits.⁷⁰ Critics consider CSR to be a means of encouraging voluntary assumption of responsibilities more properly those of governments and politicians,⁷¹ such as effective delivery of health care; or as pressure to engage in activity (for example increasing wages) which imposes an unwarranted and necessary restriction on successful corporations, to which their smaller competitors are not subject.⁷² A different approach sees CSR as a misguided misallocation of shareholders' resources, inconsistent with the primary duty of a corporation to its shareholders⁷³ - and moreover based on the misconception (contrary to the better known views of Adam Smith) that delivery of shareholder profit is inherently inconsistent with wider public benefit.⁷⁴

Each of this variety of approaches could be applied validly to the CSR IP scenarios set above. CSR could assist the IP debate considered at the outset through corporate adoption of government responsibility, or philanthropy; however, there is no consensus as to why IP owning corporations should choose to do so. In the light of this, it is not surprising that, as will be seen, while there have been practical and theoretical developments in encouraging CSR, it has been difficult to develop means of requiring and monitoring such conduct.

This is notwithstanding that "[t]he issue now is not whether corporate social responsibility is effective (or, in more general terms, to what extent regulation achieves its purpose) but the fact that regulation and the formalization of international structures of governance are increasing."⁷⁵ Such structures to manage corporate power and conduct, including codes (focussing mainly on corruption, labour and the environment, with some examples in technology transfer and consumer protection)⁷⁶ have been found, inevitably, to vary widely in content and to be somewhat circular. For effectiveness, they are dependent upon the support of the holders of that power, with this determined by the status, relevance and approach of directors, employees,

(1994) *"Adam Smith and the Philosophy of Law and Economics"* Kluwer Academic Publishers, The Netherlands ("Malloy") 113-150, at 116, 121, 126; Economist, 16-7; Weissbrodt, 902.

⁷⁰ See eg Barry, 73, 168; Novartis, 5.1

⁷¹ See eg Barry 69, 88; Economist, 15

⁷² See Barry, 10-12; Economist 10.

⁷³ See eg Barry, 68, 76, 88, 95; Browne, 12-14; Economist, 8. Note also the national differences in corporate structure and approach, considered in J.W. Salacase "Corporate Governance, Culture and Convergence: Corporations American Style or With a European Touch?" [2003] EBLR 471

⁷⁴ See eg Economist, 13, based on the work of Adam Smith; in this regard see A. Smith (1950 – 6th ed) *"The Wealth of Nations"* (Cannan. E. ed) University Paperbacks, Methuen: London, UK ("Smith"), vol 1:xli, 477-8 and vol 2: 49-50

⁷⁵ D. Levi-Faur "The Rise of Regulatory Capitalism: The Global Diffusion of a New Order" *The Annals of the American Academy of Political and Social Science* March 2005 598 *Annals* 12, 21 ("Levi-Faur"); see also Joseph, 60-1; and S. Picciotto "Rights, Responsibilities and Regulation of International Business" 42 *Colum. J. Transnat'l L.* 131, ("Picciotto") 131-2

⁷⁶ See Barry, 54; Kinley, 954; K. Gordon and M. Miyake "Deciphering Codes of Corporate Conduct: A Review of their contents" Working Papers on International Investment Number 1999/2 Organisation for Economic Co-operation and Development Directorate for Financial, Fiscal and Enterprise Affairs <<http://www.oecd.org/dataoecd/23/19/2508552.pdf>> (last accessed 9 November 2005)

shareholders, institutional investors, consumers, regulators and, to some extent, the wider industry.⁷⁷

A further layer of authority and endorsement may be forthcoming given the International Organization for Standardization ("ISO") project to develop Social Responsibility Standards. These are expected to be available in 2008.⁷⁸ The significant literature in respect of the impact of standards, both direct and indirect through network effects encouraging their respect, suggests that this will be a valuable contribution with practical impact. However, as already identified in respect of this ISO project, there is concern that the standards themselves may unduly reflect one perspective or interest group.⁷⁹

That said, as part of and in response to concerns such as expressed in this standards literature, theories are developing of the role for counternetworks and pressure groups to fetter and challenge the power of incumbent corporations. This has been particularly so in the IP field, as a reaction to the power and influence of corporations in the development of TRIPS. It has been proposed that the increasing activity of civil society and the growth of NGOs could be a catalyst for those other than IP owning corporations – which could range from human rights activists, generic manufacturers, and patients groups – to combine. Sharing resources and concerns, they could develop their own agenda for negotiation with more corporate IP interests on a range of issues in respect of which a holistic negotiation is possible, and create over time structures and influence through which they can participate fully in IP related developments – and, most relevantly here, influence the conduct of corporations and their approach to their IP.⁸⁰

Notwithstanding these developments, corporations cannot be compelled to follow standards; and the impact of networks and dialogic webs is to create an inherently voluntary framework, albeit that the actors within it may consider ultimately that they have no option but to act in a particular way. The most practical development in respect of directly influencing conduct has been the increasing focus on CSR by institutional investors. A February 2005 report found that 85% of executives and investors saw CSR as a key part of investment decisions.⁸¹ The website of Ethical Investors states succinctly that:

⁷⁷ See in this regard Barry, 56, 57; Shelton, 317-8; C Parker (2002) *The Open Corporation. Effective Self-Regulation and Democracy* Cambridge University Press, Cambridge, UK ("Parker"), 8-12, 15-7, 34, 44-4796-7, 99-110, 240-3, 245, 247-52; L. Hunter "The Rhetoric and Reality of Codes" *New Academy Review* Vol. 1 Issue 1. Spring 2002, 29, 30-1; Barry, 33-35.

⁷⁸ See <http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html?nodeid=4451259&vernum=0> (last accessed 21 November 2005). For comment on the challenges of formulating these standards, and the interests they may or should reflect, see <http://www.iisd.org/standards/csr.asp> (last accessed 21 November 2005)

⁷⁹ See eg detailed consideration in J. Braithwaite, J. and P. Drahos (2000) *Global Business Regulation* Cambridge University Press, Cambridge, UK (especially 332, 338, 566, 527), and regarding IP, see Drahos 174 .

⁸⁰ See eg Drahos in Drahos/Mayne, 175-180

⁸¹ Report by Oracle Corporation and the Economist Intelligence Unit http://www.oracle.com/corporate/press/2005_feb/orcl_eiu_final.html (last accessed 21 November 2005)

If enough people follow this investment path, it is hoped that companies will eventually be forced to review their strategy and become more socially responsible, or face possible reductions in their share prices and consequently a loss of confidence in the company.⁸²

Accordingly, while there are means of encouraging CSR, and significant international activity, programmes and resources to suggest that this has some success (which has lead to a view that adherence to CSR is part of a corporations “licence to operate”)⁸³, CSR remains, at least to some extent, voluntary. Attempts failed in the UK⁸⁴ to entrench aspects of CSR by way of introducing reporting obligations. The proposal would have covered reporting, consultation, directors’ duties, access to information, and personal injury liability for breach of labour and environmental standards in any business operations, with compensation payable by parent companies (thus avoiding questions of the appropriate corporate entity). Legislation was introduced in the United States, in respect of corporations engaging in bribery and corruption in other jurisdictions.⁸⁵ This has been criticised by business, however, as an unwarranted encroachment on commercial dealings, with pressure growing for a voluntary approach.⁸⁶

In summary, therefore, although there are examples of how CSR, in general terms, can be considered to have valuable practical impact, there is little consensus on what it actually is; why corporations should engage in it; and how this can or should be encouraged or required. If the problems of IP considered above are to be pursued further, a different approach is required.

4.4 A return to human rights?

4.4.1 Opportunities

In parallel with the developments considered above, recent developments at the international level have, as will be seen, specifically focussed on human rights as a basis for conduct. The shift to human rights may bring two benefits: firstly human rights create a specific, tangible basis for conduct in question – for example when suggesting voluntary licensing of a patent, to deliver the right to health; and secondly, a legal basis for seeking action could also bring with it legal means of enforcement.

4.4.2 Challenges and responses

This focus on human rights has taken place, however, notwithstanding marked difficulties in arguing that corporations have, or can have, international human rights

⁸² See <http://www.ethicalinvestors.co.uk/why.htm> (last accessed 21 November 2005);

⁸³ See details of UK government, industry and private activities included in <http://www.societyandbusiness.gov.uk/bestpractice.shtml> (last accessed 20 November 2005). See also 2005 report of Booz Allen Hamilton and The Aspen Institute <http://www.aspeninstitute.org/site/apps/nl/content2.asp?c=huLWJeMRKpH&b=696077&ct=778557> (last accessed 21 November 2005)

⁸⁴ UK Corporate Social Responsibility Bill 19 June 2003, 129 53/2. For comments see <http://www.amnesty.org.uk/business/campaigns/core/bill.shtml>, <http://www.dti.gov.uk/ministers/speeches/Timms021202.html> (last accessed 21 November 2005)

⁸⁵ U.S Alien Tort Claims Act – see Kinley 940-2

⁸⁶ See consideration in Bunn, 1292-8

obligations. States, not corporations, are parties to international human rights instruments. Further, as considered above in respect of TRIPS, there is a strong view among commentators that corporations can have no obligations at all under international law, such responsibilities being the sole province of states, the subjects of international law.⁸⁷

It has been argued, however, that corporations do have some international human rights obligations under the UDHR, ICCPR and ICESCR, on the basis of general, non state specific, wording (eg any “person”, not any “state”) in key provisions which deal with the protection and respect of rights set out in the instruments.⁸⁸ On this analysis, corporations should promote respect for, and protect, rights of others: thus corporations should not litigate in respect of critical comment or downloading of material, or object to parallel importing of generic pharmaceuticals, if this would interfere with rights to life, health, freedom of expression and information/education – with the significant proviso that this would only be appropriate when the limits or balances on the human rights in question suggestions that the human right, rather than the corporate IP right, should prevail.⁸⁹

4.4.3 *International initiatives*

Against this legal backdrop, as noted there have been international developments in the field of business and human rights, with the United Nations at their heart. An early development was the rather vague Global Compact of 1999, which essentially requests large corporations to respect “universally agreed values and principles” relating to human rights.⁹⁰ An attempt to introduce more specific obligations came with the UN Business Norms on Human Rights of 2003 (“Norms”).⁹¹ The Norms are draft and do not at present create any legal obligations for corporations – indeed, they

⁸⁷ See Bunn, 1302; Kinley, 935, 937-8, 944-5. See also Shelton 305, 307 regarding obligations of states to regulate conduct of multinational corporations and possible international law implications which could arise from this; and proposals for international law obligations of corporations in Kinley, 961-1019; and R. MacCorquodale “Human Rights and Global Business” 89-114 (“MacCorquodale”) in Bottomley/Kinley. Cf movement in the UK jurisdictions to horizontal human rights obligations of individuals and corporations pursuant to the Human Rights Act 1998 – see *Campbell v MGN* [2004] 2. AC 457, paras 17 and 18 with reference to broader analysis.

⁸⁸ See again Bunn, 1302. UDHR Preamble – “every organ of society... shall strive..to promote respect for these rights”; article 29 “everyone has duties to the community” – although the references to “personality” suggest that this should be restricted to human beings; and article 30 – no “person” has “any right to engage in activity aimed at the destruction of the rights and freedoms set out herein” (with similar provisions in article 5(1) ICESCR and article 5(1) ICCPR) [emphasis added by the author in each case]; see Kinley, 948-9, and MacCorquodale, 114 in Bottomley/Kinley

⁸⁹ See also Kinley, 963-66.

⁹⁰ See <<http://www.unglobalcompact.org/Portal/Default.asp?>> (last accessed 9 November 2005). Rights covered are the UDHR, The International Labour Organization’s Declaration on fundamental principles and rights at work and The Rio Declaration of the UN Conference on Environment and Development - subsequently extended to cover United Nations Convention Against Corruption. See Picciotto, 142 commenting on the “rather haphazard and selective content of the codes”; but note Novartis, para 1.2 lauding its flexible nature

⁹¹ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (U.N. doc. E/CN.4/Sub.2/2003/12/Rev.2(2003). together with interpretative commentary At <<http://www1.umn.edu/humanrts/links/commentary-Aug2003.html>> (last accessed 8 November 2005) (“Norms Commentary”) For an overview of the history of the Norms, see Weissbrodt, 905-7.

provide that the promotion, respect and protection of human rights remain the primary responsibility of states.⁹²

The preamble to the Norms refers to obligations of corporations to respect rights set out in, inter alia, the UDHR, ICCPR, ICESCR, ECHR, EU Charter and the African Charter. The Norms themselves set out, in a “succinct but comprehensive restatement”,⁹³ some of the types of rights (not directly relevant here)⁹⁴ to be respected by corporations,⁹⁵ and also include a general reference to “human rights recognized in international as well as national law.”⁹⁶ Not surprisingly, given the variety of views in respect of additional assumption or imposition of corporate responsibility considered above, the Norms have received a mixed reception. Some are critical at the unqualified acceptance of some human rights or instruments, to which not all countries have acceded, or which include emerging or controversial rights, and at the imposition of corporate obligation in this regard.⁹⁷ There is also an ongoing debate as to the possible use which could be made of the Norms in the short and medium term in international law, and their ultimate legal status.⁹⁸

The UN High Commissioner for Human Rights considered the Global Compact and the Norms in a report delivered after wide consultation with NGOs and large corporations (“February 2005 report”).⁹⁹ The February 2005 report is broadly positive, but acknowledges the challenges and objections in respect of imposing direct human rights obligations on corporations. It takes the view however, that it is appropriate for business to have some human rights responsibilities, and sees the challenge as being to create an appropriate co-existence and balance with the obligations of states.¹⁰⁰ The United Nations Secretary-General subsequently appointed a Special Representative on Business and Human Rights. The Special

⁹² Section A, Article 1

⁹³ Weissbrodt, 901- note the references at 906 to discussions as to what “human rights concepts” should be included.

⁹⁴ Sections B-G – regarding equal treatment, security, workers, national sovereignty, consumer and environmental protection.

⁹⁵ also Weissbrodt, 907-10 for consideration of what should be seen as a transnational corporation to which the norms should apply, and the appropriateness of a limitation of the human rights obligations of other corporations.

⁹⁶ Section A, article 1 with further, vague, clarification in article 23.

⁹⁷ See eg “Shell Leads International Business Campaign Against UN Human Rights Norms” March 2004 <http://www.corporateeurope.org/norms.html> (last accessed 9 November 2005)

⁹⁸ See eg T. Rule “Using ‘Norms’ to Change International Law. UN Human Rights Laws Sneaking in through the Back Door” Summer 2004 5 Chi J. Int’l. 325J. Oldenziel and Bohman (2004) “*The added value of the UN Norms. A comparative analysis of the UN Norms for Business with OECD Guidelines, the Global Compact, and the ILO Declaration of Fundamental Principles and Rights at Work*” SOMO, Amsterdam, Netherlands, 21-2. See Weissbrodt, 913-4; and Kinley, 956-960.

⁹⁹ “Report of the UN Sub-Commission for the Promotion and Protection of Human Rights. report of the High Commissioner for Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights” <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.91.doc> (last accessed 8 November 2005)

¹⁰⁰ February 2005 report 18, 19, 23-7, 36, 41, 43-5 – there is little focus on IP.

Representative is to prepare a report by 2007 on, inter alia, the human rights responsibilities of business and the regulatory role of states.¹⁰¹

4.5 New opportunities for IP and human rights

4.5.1 *Why?*

Although as noted the Norms do not themselves specifically consider IP (possibly because when corporations enforce or refuse to share their IP, they are taking advantage of the essence of a legal right)¹⁰² the Norms Commentary does. In respect of the Norms statement that corporations shall “recognize and respect applicable norms of international law, national laws and regulations, as well as the rule of law, the public interest, development objectives...”,¹⁰³ the Norms Commentary states¹⁰⁴ that corporations should respect and apply IP in a manner conducive to, inter alia, the mutual advantage of producers and users, social and economic welfare, and a balance of rights and obligations. This echoes the balance in TRIPS as considered above.¹⁰⁵

This balance, in the Norms Commentary, TRIPS and also in national IP rights, can provide a vehicle for a more human rights based approach to IP by corporations. This approach can be founded on both the more general references to human rights “recognized under international law” in the Norms, and on the possible existing obligations of corporations under human rights instruments. It could enable the existing balances to be developed to produce outcomes such as those considered above in respect of the narrower applications of CSR to IP, including a broad approach to exceptions, and voluntary licensing in some cases. This would entail corporations working within, rather than seeking to extend, those limits and balances of IP, and also considering IP in the light of their own human rights and obligations, and those of others: “[r]esolution of these claims may still be difficult, but it may become easier if both sides acknowledge that the other’s claim is founded upon a distinct human right claim rather than simple self-interest.”¹⁰⁶

The possible contribution of this argument in influencing corporate conduct is considered below, in respect of existing business initiatives based on human rights and possible bases for legal enforcement. Empirical work in respect of corporate motivation to act on the basis of human rights obligations, rather than pursuant to more general CSR objectives would, however, be valuable.

¹⁰¹ See <http://209.238.219.111/UN-Commission-resolution-business-human-rights-Apr-2005.doc> (last accessed 8 November 2005) (“Representative Resolution”); and <http://www.un.org/News/Press/docs/2005/sga934.doc.htm> (last accessed 8 November 2005)

¹⁰² This additional twist might explain the comparative lack of analysis of IP related challenges in business and human rights commentary – eg UNCTAD but note, however, brief dealing in Weissbrodt, Kinley.

¹⁰³ Section E, article 10.

¹⁰⁴ At paragraph (d)

¹⁰⁵ Article 7

¹⁰⁶ Ricketson, 200, in the context of competing human rights claims.

4.5.2 *When?*

If IP owners wish to respect international human rights obligations by balancing competing interests within, or outside, IP, what would be the ambit of those obligations? Is there a limit on the circumstances in which such balancing acts should be carried out?

The Norms provide that corporations have an obligation to promote and ensure respect for human rights “within their respective spheres of activity and influence”.¹⁰⁷ The Norms Commentary suggests that this would be assessed largely in terms of geography of business operation, rather than other impact – thus, if there were no business in, say, Malawi, should there be any obligation on a US corporation to allow drugs to be manufactured for export? It remains to be seen whether the focus will be more on “activity” than “influence” – notable commentators argue that it should not, and indeed see the flexibility inherent in “influence” as one of the main benefits of the Norms.¹⁰⁸ The question is also to be considered by the Special Representative.¹⁰⁹

4.6 *Would it work?*

4.6.1 *Compulsory conduct*

Accepting therefore, for present purposes, that there are arguments for international human rights obligations on the part of corporations; and that this basis could make IP owners more inclined to adopt a desirable new approach to IP than more general CSR arguments; does this more legal basis increase the likelihood of corporations actually being made to embrace this approach?

There is no direct international human rights enforcement mechanism in respect of corporations.¹¹⁰ Further, although there is a growing body of commentary exploring indirect opportunities through existing mechanisms, codes and conventions (not dealing with the IP field), the consensus is that these are at present inadequate in respect of requiring particular conduct – although, as with the Norms, there is debate as to their future role in creating international obligations.¹¹¹

¹⁰⁷ Section A, Article 1

¹⁰⁸ See Weissbrodt, 911-2

¹⁰⁹ See 1(c) Representative Resolution.

¹¹⁰ The question of enforcement against states, by other states or occasionally individuals (eg pursuant to the Optional Protocol to the ICCPR or Protocol 9 ECHR) cannot always be relied upon – see papers in P. Alston and J. Crawford (eds) (2000) *The Future of UN Human Rights Treaty Monitoring* Cambridge University Press, Cambridge, UK.

¹¹¹ See Bunn, 1276-8 for overview of international developments in various spheres- including the International Labour Organisation and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1280-7 regarding initiatives of the United Nations and also 1304. See also A. M. Truelove “Oil, Diamonds, and Sunlight: Fostering Human Rights Through Transparency In Revenues From Natural Resources” *Georgetown Jnl of Int’l Law* Fall 2003 Vol 35 No.1 207 for overview of difficulties in creating and working with the OECD Convention on Combating Bribery; and Kinley, 935-6, 944-7, 949-52 and 958-61 for overview existing instruments and codes, their possible wider role and their adequacy and effectiveness, and 962-1019, also considering at 962, 993, 995 possible creation of indirect obligations of corporations, through states, at international law.

Against this backdrop, the Norms contain, unusually, provisions for implementation. These include the adoption, dissemination and implementation by corporations of codes and internal rules, monitoring by the United Nations and through state established frameworks, and reporting provisions.¹¹² Reaction to these measures has again been mixed, however, with their practical effect being challenged.¹¹³ Key issues are their dependence on states and corporate support – the very problems the Norms sought to address. The February 2005 report also notes that these difficulties with enforcement.¹¹⁴

Indeed, the February 2005 report and the appointment of the Special Representative appear to have reignited the never silent debate in terms of the compulsory ethos of the Norms. The International Chamber of Commerce, expressing concern that the voluntary contribution of business to human rights through initiatives and collaborations is not properly recognised, is strongly of the view that corporate contribution should be on a voluntary basis, with states retaining sole legal responsibility in respect of human rights.¹¹⁵ Holders of contrary views, such as Amnesty International¹¹⁶ and the International Commission of Jurists,¹¹⁷ argue, again strongly, for increased legal action creating corporate obligations. They consider that corporations should have responsibilities, and that the history of human rights teaches that these will not be respected without an element of compulsion. These views suggest that a consensus on any enforcement or monitoring function in respect of the Norms is unlikely.

Thus, given difficulties with enforcement of any international human rights obligations in respect of corporations, and with ensuring respect for the Norms, voluntary conduct will likely continue to lie at the heart of the business and human rights debate.

4.6.2 Voluntary conduct

From the practical perspective in this regard, the Norms have been seen as usefully aspirational, but also of potential real effect.¹¹⁸

An example of what can be achieved can be seen in the large pharmaceutical corporation Novartis. Novartis adopted a positive approach to both CSR and human rights.¹¹⁹ Following the Global Compact, it took significant steps to revise its business

¹¹² Section H, articles 15-18. See also Weissbrodt, 913, 915-7, and suggestions for further support for compliance at 917-20, and Kinley, 997-8.

¹¹³ See Weissbrodt, 913/4; Bunn, 1270

¹¹⁴ February 2005 report 18, 43-45.

¹¹⁵ For collections of ICC documents see <<http://www.iccwbo.org/policy/society/id4789/index.html>> (last accessed 8 November 2005)

¹¹⁶ See G. Chandler “A human rights opportunity for the corporate world” <<http://209.238.219.111/Chandler-Human-Rights-Opportunity-June-July-2005.doc>> (last accessed 8 November 2005)

¹¹⁷ N Howen, Secretary-General International Commission of Jurists 21 September 2005 “Business, human rights and accountability” <<http://www.business-humanrights.org/Links/Repository/684768/jump>> (last accessed 8 November 2005) (“Howen”).

¹¹⁸ Eg Weissbrodt above

¹¹⁹ See Novartis, para 1.4

practices¹²⁰ for example regarding access to medicines (although it is noteworthy that it felt that there were limits on what could be achieved by one, albeit powerful, corporation, which facing the significant challenges in this field).¹²¹ Examples of its activity include an agreement with the WHO in late 2005 in respect of supply of treatment for leprosy.¹²²

The broader question of the impact of the Norms is presently being investigated by the Business Leaders' Initiative on Human Rights ("Initiative"). The Initiative was set up to test and evaluate both the outcomes and challenges which may be encountered by adherence to the Norms, in a range of industries and environments.¹²³ The Initiative's focus is on developing tools to assist in identifying different "essential," "expected" and "desirable" corporate behaviours, within each context in the light of wider community expectations, and to facilitate corporations' adoption of an effective moral, social and economic approach to human rights. Novartis is also part of the Initiative.¹²⁴

Not all corporations are like Novartis, however, nor, as has been seen, will all wish to engage in similar conduct on the basis of the Norms. There is therefore a need, if there is to be practical benefit from using legal obligations as a base, to explore other means of encouraging respect for a less commercial approach to IP, based on human rights.

4.7 Benevolence?

4.7.1 *Again, when?*

Throughout the literature, commentators return to the question of enlightened self interest as the reason for corporations to choose to embrace CSR and human rights.¹²⁵ This could also be the catalyst for firmly grounding human rights in the corporate IP landscape. Somewhat ironically, it draws support from the work of Adam Smith, whose other work is often, as stated above, used to challenge the need for CSR in the broadest sense. Adam Smith considered that individuals, which should include corporations, will voluntarily, benevolently, act to assist another if this will also further their own ultimate interest, if those acts are of benefit to the immediate

¹²⁰ See Novartis, paras 3.1-3.2

¹²¹ Novartis, para 3.3

¹²² See http://www.novartis.com/news/en/20051104_leprosy.shtml (last accessed 8 November 2005). Webpage also provides details of corporate citizenship policies.

¹²³ Business Leaders Initiative on Human Rights "Report 2: Work in Progress" December 2004 <<http://www.blihr.org/Pdfs/BLIHR%20Report%202004.pdf>> (last accessed 9 November 2005) ("Initiative Report") – see in particular 6-8, 13-4, 65-7. See also speech to the United Nations 23 June 2005 < available via <http://www.blihr.org/> > (last accessed 8 November 2005) ("United Nations Business Speech")

¹²⁴ See Initiative Report, 45-49

¹²⁵ Eg Howen "a mix of enlightened voluntary action with binding obligations"; February 2005 report 16; and United Nations Business Speech "addressing issues through a human rights "lens" can be beneficial for business".

community of which they form part.¹²⁶ What is the “immediate community” in this context, within which the conduct based in human rights obligations (notwithstanding difficulties in enforcement) could be justifiable, and therefore more attractive, on the basis of the interests of the IP owner?

Given firstly the power enjoyed by some IP owning corporations, and secondly the nature of circumstances suggesting voluntary benevolent conduct – say, a child suffering from a rare treatable disease, outwith compulsory licensing requirements, but where there are no health trust funds for treatment, or permitting downloading and copying of material for use by a charity which may or may not be fair dealing – there are two responses to this. One is that, given consideration above of the power accrued by some international IP owning corporations, their immediate community is global; and as such includes all those whom they have power to assist. As well as taking an extreme view of the implications of globalization, the floodgates of claims which may be made as a result of such voluntary conduct by corporations mean that firstly, it is highly unlikely that the corporation would find this course appealing; and secondly, it is unlikely that it could be argued, notwithstanding the apparent logic, that such a course would in fact be in the ultimate interests of the corporation, given the inevitable diversion of resources which would be entailed.

The preferable alternative is that it is appropriate to extend the concept of immediate community to cover those in need whom it is reasonably foreseeable¹²⁷ will be affected by the actions of the IP owning corporation, and whom it is reasonable to expect the corporation to assist. This approach echoes that of the Norms’ concept of “spheres of influence” within which corporations, pursuant to the Norms Commentary,¹²⁸ should “use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses.....and shall use their influence in order to help promote and ensure respect for human rights.” The factors of due diligence, reasonableness and abuse should all form part of the assessment of reasonableness.

It would not be reasonable to suggest that the more property based aspects of IP rights should invariably be prevailed upon, taking second place to human rights. The aim is rather to ensure that when a corporation is made aware of a situation where, if a rigid approach is adopted to an IP right, there will be extreme negative consequences; and if for reasons forming part of that, such as lack of funding, or an area of severe deprivation and need, it is unlikely that the IP right could be exploited in a more conventional way such that a licence fee could be obtained; it would be reasonable, balancing the IP and human rights interests and obligations of the IP owner with those of the person in need, for that person to be within the immediate community of the corporation.

The approach advocated should not provide a basis for subsequent attack on the IP owner’s enforcement of the IP right in other, “non reasonable”, circumstances; or indeed for the IP owner to argue, with rhetorical flourish, that the suggested conduct

¹²⁶ Smith, 18, 26-7; Smith1, 340-9; Smith2, 117-2, 346, 385. See also Barry, 71; 75, 171; 172; and J. Evensky, “Professor Malloy, Judge Posner, and Adam Smith’s Moral Philosophy” in Malloy 189-198, at 192, 194.

¹²⁷ importing concepts from the law of negligence. See also Kinley, 964-5, 969

¹²⁸ Section A, Article 1, Commentary (b)

would mean that there was no incentive for them to engage in any further investment or innovation. The focus is on working within the balance of the IP right or balancing with human rights obligations, to deal with that particular situation. This need not remove all incentives to develop drugs for sale in developed world markets, even if some have to be exported more cheaply, or given away in developing areas from which it is highly unlikely that sales would have been gained. Steps could be taken to try to address problems arising from reimport into developed country markets.¹²⁹ There could also, for example, still be sufficient incentive to invest in a database and object to its utilisation by competitors, even if it is used by a school for part of a for profit fundraising venture, which could possibly in fact infringe as commercial use, is permitted.

4.7.2 *Could it work?*

Examples from the IP field show that there have been instances of IP owning corporations being prepared to take a less property based approach to their IP – to be benevolent.

A well known situation was the challenge by IP owning pharmaceutical corporations to South African legislation, likely compliant with TRIPS, which facilitated provision of patented medicines to treat HIV/AIDS.¹³⁰ This met with public outrage and there is a strong view that this at least contributed to the corporations settling this case. It has been argued, however, that the settlement may also have been in the long term interests of the corporations, and contrary to the interests of those seeking medicines, in terms of the future of patent licensing in South Africa.¹³¹

Concern as to the likelihood of challengers to IP's more extreme implications successfully relying on benevolence and enlightened self-interest grows when further developments in respect of access to medicines are considered. The groundswell of international concern in respect of the South African case, and the access to medicines issue generally, contributed to the WTO declarations at Doha and Cancun.¹³² These deal with interpretation of compulsory licensing provisions of TRIPS in respect of public health, and the circumstances when there could be such compulsory licensing for manufacture of patented medicines, both for the local market and for export. Commentators have considered, however, the limited instances of compulsory licensing being introduced, and that fact that full advantage may not be being taken of

¹²⁹ Cf *Glaxo v Dowellhurst* 2003 WL 21729286; 2003 WL 23014797; and 2004 WL 412961. See also <<http://www.patent.gov.uk/about/consultations/compulsorylicensing/index.htm>> (last accessed 21 November 2005)

¹³⁰ See E. Cameron and J. Berger. "Patents and Public Health: Principle, Politics and Paradox" Inaugural British Academy Law Lecture <<http://www.law.ed.ac.uk/ahrb/script-ed/docs/cameron.asp>> (last accessed 9 November 2005) ("Cameron") section VI; H. Murakyembe and G.M. Kanja "Implications of the TRIPS Agreement on the Access to Cheaper Pharma Drugs by Developing Countries: Case Study of South Africa v The Pharmaceutical Companies" *Zambia Law Journal* vol 34, 2002, 111, at 111 and 130 et seq; and Wai, 65

¹³¹ See Wai, 67, 78-9, Drahos 1, 6-9. See also Cameron, sections VI-VIII

¹³² Declaration on the TRIPS agreement and public health" DOHA WTO MINISTERIAL 2001: TRIPS. Adopted on 14 November 2001. WT/MIN(01)/DEC/2 20 November 2001 <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> (last accessed 9 November 2005); and "Implementation of paragraph 6 of the Doha Declaration on the TRIPS agreement and public health" Decision of the General Council on 30 August 2003 <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm> (last accessed 9 November 2005).

the possibilities within the instruments, as within the TRIPS agreement. There is a strong view that, as with TRIPS, the position of corporations has contributed to this.¹³³

Such questions are a reminder of the inherent limits of any attempt to fetter the approach of corporations outside an enforceable legal framework. While as considered above there are significant examples of the voluntary involvement of corporations in global health projects, it would seem that corporations are less likely (again, perhaps inevitably) to be willing to engage in activity of other's choosing, rather than of their own.

In further assessing the likely success of reliance on benevolence, the more contemporary debate in respect of global avian flu and the H5N1 virus will be instructive. Possible treatments, **TAMIFLU** and **RELENZA**, are patented by pharmaceutical corporations. How these are dealt with in the future raises key questions of IP and human rights – and of whether corporations consider it in their ultimate self interest to donate treatments and share their IP. So far, it appears that corporations are adopting a benevolent approach in both respects, subject to concerns as to the ability of generic manufacturers to produce drugs of the necessary quality and standard.¹³⁴

It remains to be seen how this will develop over the coming years, and also the extent to which it comes to be argued that the approach of corporations has indeed been motivated by concerns for those in what they may see as their own immediate communities - the developed world. While consistent with a more conventional approach to benevolence, this possibility means that the real test may come if, say, the virus were contained more quickly in the developed world, with treatment still required by developing areas.

4.7.3 *How would it work?*

While experiences considered mean that the question of what would be involved by a corporation adopting a benevolent human rights approach in the pharmaceutical sector is fairly clear, this is not the case elsewhere. Revealingly, the February 2005 report called for universal standards to “assist business, states and civil society to navigate the human rights dimensions of the corporate social responsibility framework”.¹³⁵ In the light of this, the Special Representative's report is to include a compendia of best practice.¹³⁶ Possible routes for further clarification regarding IP are through corporate codes, trade association guidelines (subject always to competition law),¹³⁷ or specific issue guidelines - an example is the International Code of Marketing of Breast-milk

¹³³ See Wai, 72 and Cameron, section VI.

¹³⁴ See eg http://www.who.int/mediacentre/events/2005/meeting_avian_influenza/en/index.html (last accessed 7 November 2005)

¹³⁵ See p49

¹³⁶ See Representative Resolution, 1(e)

¹³⁷ For an overview of developments in this regard, see Bunn, 1287-90, and UNCTAD, 31-42. See Levi-Faur, 26 for a consideration of the theoretical aspects of spread and appeal of these forms of regulation.

Substitutes 1981.¹³⁸ Possible details in codes or guidelines could relate to: what illnesses would qualify for compulsory licensing of medicines; how the licence fee is to be calculated and what should be the key terms in different situations; and what books, for which ages, in what format, should be made available online.

Although, as considered above, codes and guidelines cannot be relied upon in themselves to require or even encourage conduct, if corporations were minded to adopt the approach advocated, codes could be of practical value. Inevitably, however, all situations could not be addressed, and there will also be need for general rules or indications of appropriate approach as to what would constitute a human rights based approach to IP.

Further guidance here could come from the United Nations, firstly in the form of general comments of the UN Committee on Economic Social and Cultural Rights. Although as considered above there is as yet no general comment in respect of IP, and present proposals are fairly confined, the Norms Commentary refers to general comments in respect of health, food, water and housing, as setting out standards to be observed by corporations regarding relevant human rights.¹³⁹ These, together with the statement and resolutions in respect of IP and human rights referred to above, provides further detail as to what is seen as appropriate balances in principle between IP and human rights, and how to move towards this. "Human rights approaches" promoted in other fields, such as the Millennium Goals and the Declaration on the Right to Development 1986,¹⁴⁰ may also be a useful source of reference.

5. Conclusion

Human rights already play a part in interpreting IP rights and influencing conduct in respect of IP, as does CSR in the latter case. However, this could be taken further with human rights providing a legal lever to mould the basic approach to IP, and the manner of its application, directing and encouraging its use to ensure fairer outcomes, consistent with human rights and, frequently, with IP. As this approach will not invariably be required by courts, benevolence can fill a gap by providing a stimulus to balance reasonably the competing interests within and outside IP, with human rights playing a key role.

Together, these doctrines could foster and mutually reinforce a silent evolution of IP and its application - grounded in, respecting and developing the balance of interests already within the international legal IP¹⁴¹ and human rights regimes. This could move towards dissolving, in accordance with contemporary societal values, barriers

¹³⁸ See <http://www.babymilkaction.org/regs/res3422.html> (last accessed 9 November 2005); also UNCTAD, 33

¹³⁹ Norms Commentary, 12, (a)-(d)

¹⁴⁰ See <http://www.un.org/millenniumgoals/>, <http://www.unhchr.ch/html/menu3/b/74.htm> and <http://www.unhchr.ch/development/approaches.html> (last accessed 9 November 2005); also Brown, 32-3.

¹⁴¹ An overview of a range of issues and views which would be encountered at a theoretical level, particularly from the US perspective, if there was felt to be encroachment on property can be gained from R.A. Epstein (1985) *Takings. Private Property and the Power of Eminent Domain* Harvard University Press, Cambridge, Massachusetts, USA, ix, 13, 25, 31, 319 cf J. Christman (1994) *The Myth of Property. Towards an Egalitarian Theory of Ownership* Oxford University Press, Oxford, UK, 6, 21, 41, 125/6, 130/1.

between business drivers and social and moral issues, and addressing issues of the nature considered in the introduction.¹⁴² The inherent lack of an external enforcement mechanism, however, means that, once again, power is held by the IP owning corporations. May they use it wisely.

¹⁴² See Parker, 245, 293-4, 298-9, 300-1 regarding the need for a “marriage” of, inter alia, business, law and social responsibility; and MacMillan, 19-20. See also Parker 34, 131-4, and 186; Kinley 1022-3 re “unlocking compartments”; Shelton, 280; Smith2, 112-4, 125; Barry, 71